Filed 2/27/12 Meeker v. Bank of America CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| MARIANNE MEEKER,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>BANK OF AMERICA, N.A.,<br><br>Defendant and Appellant. | B225289<br><br>(Los Angeles County<br>Super. Ct. No. SC102674) |

APPEAL from a judgment of the Superior Court of Los Angeles County. John H. Reid, Judge. Affirmed in part; order denying attorney fees vacated and matter remanded for further proceedings.

Mesisca, Riley & Kreitenberg, Dennis P. Riley and Rena E. Kreitenberg for Plaintiff and Appellant.

Reed Smith, David C. Powell, Raymond A. Cardozo, Heather B. Hoesterey, Zareh A. Jaltorossian and Miles M. Cooley for Defendant and Appellant.

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Plaintiff and appellant Marianne Meeker appeals the trial court's grant of summary judgment in her unlawful detainer action against tenant Bank of America. Bank of America also appeals, contending that the trial court erred in failing to award attorney fees after granting summary judgment. We affirm the summary judgment and hold that as a matter of law, Bank of America was the prevailing party in the litigation and was entitled under Civil Code[1] section 1717 to an award of reasonable attorney fees.

## FACTUAL AND PROCEDURAL BACKGROUND

Marianne Meeker filed an unlawful detainer action against Bank of America on April 17, 2009, in which she alleged that Bank of America had breached its commercial real estate lease by failing to pay business taxes.

Bank of America successfully moved for summary judgment, and then sought an award of attorney fees as the prevailing party. The trial court found that there was no prevailing party in the action and denied the fee request.

Both Meeker and Bank of America appeal.

## DISCUSSION

### I. Appeal: Summary Judgment

Bank of America moved for summary judgment on seven different grounds, several of which the trial court found to support judgment in the bank's favor. Meeker contends that the summary judgment was erroneously granted. A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary

[1] Unless otherwise indicated, all further statutory references are to the Civil Code.

judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

Summary judgment was properly granted on the basis that Meeker had failed to serve the statutorily required notice prior to instituting the unlawful detainer action. Code of Civil Procedure section 1161, subdivision (3) requires that when a tenant continues to possess the premises "after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held" beyond the covenant to pay rent, the owner must provide "three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property" before filing an unlawful detainer action. (Code Civ. Proc., § 1161, subd. (3).) The notice "must advise the tenant of the alleged breach. If it does not do so, the tenant cannot know whether to comply with the notice to quit or remain in possession and contest the landlord's allegations." (*Delta Imports, Inc. v. Municipal Court of Los Angeles Judicial District* (1983) 146 Cal.App.3d 1033, 1036 (*Delta Imports*).) Strict compliance with the statutory notice requirements is required (*Culver Center Partners East No. 1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 749 (*Culver*)), and "[a] tenant may defend against an unlawful detainer action by asserting that the lessor has not provided proper notice . . . ." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1117.)

None of the documents that could be considered notice[2] satisfied the requirements of Code of Civil Procedure section 1161, subdivision (3). The breach alleged in the

[2] Besides the documents addressed in the following discussion, one additional document giving notice to Bank of America, a letter dated March 2008, was mentioned in the complaint and acknowledged as a notice sent by Meeker in Bank of America's summary judgment papers. Neither the parties nor the trial court discussed the sufficiency of the March 2008 letter individually in the summary judgment papers or ruling; we suspect this is because it cannot be contended reasonably that the letter, although it did mention alleged breaches of the lease including the failure to pay business taxes, constituted statutory notice under Code of Civil Procedure section 1161, subdivision (3). Rather than articulate a demand for possession of the property, the letter instead advised that the owners were formally notifying Bank of America of its default

unlawful detainer action was that Bank of America allegedly had not paid its business taxes and provided proof of such payments to the owners of the property. None of the notices given in December 2008 alleged that Bank of America had breached the lease by failing to pay business taxes.

The letter of December 4, 2008, was a cover letter accompanying a "Three Day Notice to Pay Rent or Quit" of the same date. The letter stated that "[t]he basis" for the notice was "the failure by the Bank to comply with Article II[,] Section 2 of the Master Lease requiring that upon the direction of the owners, the Bank must tender rent to a designated depository. . . . [T]he rent for the month of November was not paid in accordance with the owners' direction and the failure to pay said rent is the subject of the Notice." This document served only to allege a breach of the covenant to pay rent and was not notice sufficient to alert Bank of America of an alleged breach concerning the covenant to pay business taxes.

The Three Day Notice to Pay Rent or Quit accompanying the December 4, 2008 letter alleged that Bank of America had breached the lease by failing to pay rent: "NOTICE IS HEREBY GIVEN that, pursuant to the written lease agreement by which you hold possession of the premises . . . there is now due, owing and unpaid a total sum of ($100,631.96) being rent due and owing . . . ." The notice required Bank of America to pay the rent demanded in full or to surrender the premises. Again, like the notice letter, this document alerted Bank of America only that Meeker alleged that Bank of America had breached the covenant to pay rent.

Finally, the December 17, 2008, "Forty Five Day Notice to Cure Covenant or Quit" issued by Meeker listed three alleged breaches by Bank of America. Two, not relevant here, alleged a failure to tender documentation concerning a sublease of the

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and "plac[ing Bank of America] on notice of [the owners'] right to exercise any remedy provided by the lease." It has long been held that a notice under this statute "requires a demand for possession to be made before suit" (*Schnittger v. Rose* (1903) 139 Cal. 656, 663), and because no demand for possession of the property was included in the letter, it cannot be considered adequate notice preceding an unlawful detainer action. Neither party has identified any other documents that could reasonably be construed as notice.

property and a failure to procure proper insurance coverage. The other alleged breach was the "[f]ailure to tender copies of all checks or drafts issued by Tenant to the City of Beverly Hills for the past two years, including payment of all penalties and interest accrued for delinquent or late payment and/or original receipts of all such payments. As of the mailing of this letter, the owners have not been issued a current Business License." This document also does not mention business taxes, and it is therefore insufficient to advise Bank of America that the breach claimed by Meeker includes the failure to pay business taxes. As the trial court observed, "This notice does not state that Bank of America is in default under the lease for failing to pay business taxes to the City. Rather, the notice provides that Bank of America failed to tender certain documents regarding the sublease and copies of checks issued by Bank of America to the City. If the second ground listed in the notice is supposed to include the failure to pay taxes, it does not clearly indicate. Rather, since Plaintiff states that the owners of the property ha[ve] not been issued a current [b]usiness [l]icense, it appears that Plaintiff is requesting documentation regarding payment of business license fees, not business taxes. Due to the failure to indicate that Bank of America was in default on the lease for failure to pay taxes to the City, this action cannot be based on the Forty Five Day Notice."

Meeker argues on appeal that summary judgment should not have been granted because the notices were legally sufficient. She contends that there is no requirement that the amount of taxes due be stated with specificity and argues that the Forty Five Day Notice was adequate under Code of Civil Procedure section 1161 because it "expressly identifies that Respondent was in breach, the nature of the breach and an election of forfeiture of the lease." While we, like the trial court, acknowledge that there appears to be no requirement that the amount of taxes be specifically stated in the notice given under section 1161, subdivision (3), it was the failure to identify the nature of the covenant that allegedly was not performed—not a failure to state an amount of unpaid taxes—that rendered the notice defective. Contrary to Meeker's assertion that the Forty Five Day Notice "clearly set forth the breach at issue as a failure to pay business taxes, penalties

and interest and to provide 'checks or drafts issued by the Tenant to the City of Beverly Hills for the past two years,'" the notice does not mention business taxes at all.

Next, Meeker contends that correspondence from and subsequent negotiations by Bank of America's counsel establishes that Bank of America knew that business taxes were at issue. Meeker provides no authority for the principle that notice need not comply with Code of Civil Procedure section 1161, subdivision (3) if the tenant already knows or subsequently learns of the nature of the dispute, and we are unaware of any such authority. Code of Civil Procedure section 1161 includes no "awareness" exception. The decisional law, moreover, is clear both that the statute requires that the tenant be "served with a written notice [citation], specifying the alleged breach" (*Delta Imports, supra,* 146 Cal.App.3d at p. 1036) and that the summary remedy of unlawful detainer is available only when the property owner has demonstrated strict compliance with statutory notice requirements. (*Culver, supra,* 185 Cal.App.4th at p. 749.)

Finally, Meeker argues that the reference to a business license in her Forty Five Day Notice is the equivalent of a reference to business taxes. She relies for this argument on *City of Los Angeles v. Moore Business Forms, Inc.* (1966) 247 Cal.App.2d 353, in which the Court of Appeal observed that under the Los Angeles Municipal Code, the City of Los Angeles's business license tax was not levied on sales but measured by gross sales. (*Id*. at p. 358.) Meeker does not direct us to any language in the opinion that states that business license taxes are identical for all purposes to gross receipt taxes such that a reference to one is the same as referring to the other, nor do we find any language applicable to the present case in the opinion.

Meeker has not demonstrated any error here. Because the notices given to Bank of America failed to satisfy the statutory requirements for a notice to quit, Meeker was not entitled to the summary remedy of unlawful detainer. The summary judgment was properly entered on this ground. Our conclusion that this basis for summary judgment was proper makes it unnecessary to address the remaining grounds on which the trial court relied in granting summary judgment in Bank of America's favor.

## II. Cross-Appeal: Denial of Attorney Fees

After obtaining summary judgment in its favor, Bank of America sought an award of attorney fees involved in defending against this action on the contract pursuant to the attorney fee provision in the contract and section 1717. The trial court denied the request for attorney fees on the ground that there was no prevailing party in the lawsuit. The trial court reasoned that there was no prevailing party because Bank of America's summary judgment was based on procedural defects in the litigation rather than a determination of the merits in its favor. Bank of America appeals the denial of attorney fees.

We conclude that the trial court lacked discretion to find that Bank of America was not the prevailing party in this unlawful detainer litigation. Section 1717 requires trial courts to award attorney fees to the prevailing party on the contract when the underlying contract specifically provides for such an award. (§ 1717, subd. (a).) The court must make this determination when requested, "whether or not the suit proceeds to final judgment." (§ 1717, subd. (b)(1).) The statute provides that "[t]he court may also determine that there is no party prevailing on the contract for purposes of this section." (*Ibid.*)

The California Supreme Court observed that the cases in which a trial court may find that there is no prevailing party are typically those "in which the opposing litigants could each legitimately claim some success in the litigation." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 875 (*Hsu*).) "By contrast, when the results of the litigation on the contract claims are *not* mixed—that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other—the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant. Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law." (*Id.* at pp. 875-876.)

This approach, the Supreme Court explained, "properly reflects and effectuates" the legislative intent of section 1717. "It is consistent with the underlying purposes of the

statute—to achieve mutuality of remedy—and it harmonizes section 1717 internally by allowing those parties whose litigation success is not fairly disputable to claim attorney fees as a matter of right, while reserving for the trial court a measure of discretion to find no prevailing party when the results of the litigation are mixed." (*Hsu, supra*, 9 Cal.4th at p. 876.)

Accordingly, the Supreme Court concluded that to determine whether there is a party prevailing on the contract for purposes of section 1717, "the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Hsu, supra*, 9 Cal.4th at p. 876.)

Here, Bank of America obtained summary judgment in its favor on the unlawful detainer claim. As the purpose of the litigation was to terminate the lease and regain possession of the property, neither of which occurred, Meeker clearly failed in achieving her goals. Bank of America, in turn, remained in possession of the premises, succeeding in its litigation objective. (See, e.g., *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 485 ["The object of Mitchell's unlawful detainer action was to summarily terminate the lease and regain possession of the premises and Ferrantelli's objective was to prevent either event from occurring. By voluntarily dismissing its action, Mitchell failed in its litigation objective and Ferrantelli succeeded in its"]; *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 10-11 [for purposes of section 1717 in an unlawful detainer action, "respondent was the prevailing party, receiving continued possession of the premises"].)

In *Hsu, supra*, 9 Cal.4th at pages 876 and 877, the Supreme Court held that when the judgment is a "'simple, unqualified win' [citation]" for the defendant "on the only contract claim," the trial court has no discretion to deny attorney fees to the defendant, who is the prevailing party as a matter of law. Although the win here came through a

summary judgment rather than after a trial, the decision in *Hsu* compels the same conclusion here. The summary judgment was a complete, simple, unqualified win for Bank of America on the unlawful detainer action. Because Bank of America "successfully defended the only contract claim in [its] litigation with" Meeker, Bank of America was, "as a matter of law, the part[y] prevailing on the contract." (*Id*. at p. 877.) Accordingly, "[i]n this situation, the trial court had no discretion to deny" Bank of America its attorney fees under section 1717 by finding that there was no party prevailing on the contract, and "[t]he record contains no substantial evidence to support such a finding." (*Id*. at p. 876.)

Meeker argues that the trial court had discretion to conclude that Bank of America was not the prevailing party because the summary judgment was granted on technical grounds rather than on the merits of the contract claim. The resolution of a case on procedural grounds rather than on the merits does not impact the determination of a prevailing party. In *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950, the trial court granted the defendant's motion to quash service for lack of personal jurisdiction. (*Id*. at p. 952.) The Court of Appeal confirmed that the defendant was the prevailing party, rejecting an argument similar to Meeker's that without a determination of a contract claim's merits, there was no party prevailing on the contract. (*Id*. at pp. 955-956.) The court explained, "The only claims before the trial court were contained in Profit Concepts's complaint, which sought compensatory and punitive damages in an amount to be determined, as well as preliminary and permanent injunctive relief. The case in California has been finally resolved. What was awarded on Profit Concepts's complaint? Zero. Thus, the contract claim was finally resolved within the meaning of *Hsu v. Abbara*, and that case does not use the term 'merits.'" (*Id*. at p. 956, italics omitted; see also *PNEC Corporation v. Meyer* (2010) 190 Cal.App.4th 66, 71-72 [when an action on a contract is dismissed for forum non conveniens, attorney fees are available to the prevailing defendant under section 1717 despite the lack of resolution of the merits of the contract claim]; *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 799 [party that succeeded in obtaining an order denying a

petition to compel arbitration was the prevailing party in the action on the contract under section 1717 although the underlying contractual dispute had not been resolved].)

The trial court erred in denying Bank of America its attorney fees under section 1717, and the matter is remanded with directions to the trial court to enter a new order deeming Bank of America the prevailing party as a matter of law and making an award of reasonable attorney fees pursuant to section 1717.

## DISPOSITION

The order denying attorney fees to Bank of America is vacated and the matter is remanded to the trial court with directions to enter a new and different order naming Bank of America the prevailing party in this action and awarding reasonable attorney fees to Bank of America under Civil Code section 1717. In all other respects, the judgment is affirmed. Bank of America shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.